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Attorneys for Apple Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

APPLE INC., a California Corporation

Plaintiff,

v.

MASIMO CORPORATION,
a Delaware corporation; and
CERCACOR LABORATORIES, INC.,
a Delaware Corporation,

Defendants.

CASE NO.

**DECLARATION OF JOSHUA H. LERNER
IN SUPPORT OF APPLE INC.'S MOTION
TO QUASH SUBPOENA AND FOR A
PROTECTIVE ORDER**

[Related to Case Nos. 8:18-cv-02001-JVS-JDE
(C.D. Cal. filed Nov. 8, 2018) and 8:20-cv-
00048-JVS (JDEx) (C.D. Cal. filed Jan. 9, 2020)]

Date: TBD
Time: TBD
Crtrm: TBD
Judge: TBD

UNDER SEAL

FILED

MAR 10 2020

SUSAN Y. SOONG
CLERK, U.S. DISTRICT COURT
NORTH DISTRICT OF CALIFORNIA

CV20-80061-MISC VKD

DECLARATION OF JOSHUA H. LERNER

I, Joshua H. Lerner, declare and state as follows:

1. I am an attorney duly licensed to practice law before this Court and all courts of the State of California. I am an attorney with the law firm of Gibson, Dunn & Crutcher LLP (“Gibson Dunn”), counsel of record for Apple Inc. (“Apple”) in the above-entitled action. I am one of the attorneys primarily responsible for the representation of Apple in *Masimo Corp. et al. v. Apple*, No. 8:20-cv-00048-DOC-DFM, (C.D. Cal., Jan. 9, 2020), and in this matter. I make this declaration in support of Apple’s Motion to Quash Subpoena and for Protective Order (“the Motion”). I have personal, firsthand knowledge of the facts stated herein and, if called upon to do so, could and would competently testify thereto.

2. On January 8, 2020, Plaintiffs served a subpoena on Apple in connection with *Masimo Corp. et al. v. True Wearables Inc. et al.*, No. 8:18-cv-02001-JVS-JDE (the “True Wearables Case”), noticing a deposition and requesting the production of documents. Attached hereto as **Exhibit 1** is a true and correct copy of the subpoena served by Plaintiffs in connection with the True Wearables case on January 8, 2020.

3. Counsel for Apple began conferring with Plaintiffs on January 14, 2020. Apple thereafter repeatedly agreed to extend the meet and confer process—and to extend the deadline to respond—because Plaintiffs were still collecting documents from the True Wearable Defendants and had not deposed Marcelo Lamego. Attached hereto as **Exhibit 2** is a true and correct copy of relevant email correspondence between the Parties from January 14 to March 5, 2020.

4. On February 27, the Parties met and conferred and again agreed to delay discussions while Plaintiffs pursued discovery in the True Wearables case. Counsel agreed to meet and confer on March 4 at 10:30 a.m. and to extend the deadline for Apple to object or otherwise respond until March 6. On March 4, with no warning, Plaintiffs’ counsel cancelled the meet and confer. Plaintiffs’ counsel waited until after 8:45 p.m. that evening to respond to repeated inquiries, and then suggested that the Parties meet and confer late in the afternoon the day before the deadline to object or

1 otherwise respond. Apple agreed to adjust to suit Plaintiffs' counsel's schedule, but sought two
2 business days to discuss the outcome of the meeting.

3 5. Counsel met and conferred at 4:30 p.m. on March 5, 2020. Apple explained that
4 neither the document requests nor deposition topics are tied to the claims in the True Wearables Case.
5 Plaintiffs' counsel responded that the allegations in the trade secret claim, particularly those asserted
6 in paragraphs 82 and 83 of the True Wearables First Amended Complaint, are broad, but conceded
7 that these allegations are related to True Wearables, not Apple. Rather than withdraw the subpoena,
8 or wait to conduct discovery in the Apple Case, however, Plaintiffs' counsel insisted that Apple serve
9 objections to the subpoena. Apple asked that Plaintiffs reconsider their position and come back with
10 a final position on March 6, 2020, but Apple did not hear from Plaintiffs on that date.

11 6. On March 9, 2020, Apple followed up with a letter to Plaintiffs' counsel, reiterating its
12 position that the subpoena is improper, and explaining its intention to file a motion to quash and for a
13 protective order should Defendants not withdraw the subpoena by March 10, 2020. Attached hereto
14 as **Exhibit 3** is a true and correct copy of the letter sent by Apple to Plaintiffs on March 9, 2020. As
15 of the time of filing of Apple's Motion, Plaintiffs have not responded to Apple's March 9, 2020 letter
16 or withdrawn their subpoena.

17
18 I declare under penalty of perjury that the foregoing is true and correct.

19
20 DATE: March 10, 2020

21
22 By: 

23 Joshua H. Lerner
24
25
26
27
28

Exhibit 1



**Service of Process
Transmittal**

01/08/2020

CT Log Number 536938677

TO: Ami Gomez
Apple Inc.
1 Infinite Loop, M/S 169-2NYJ
Cupertino, CA 95014-2083

RE: Process Served in California

FOR: Apple Inc. (Domestic State: CA)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION:	Masimo Corporation and Cercacor Laboratories, Inc., Pltfs. vs. True Wearables, Inc. and Marcelo Lamego, Dfts. // To: Apple Inc.
DOCUMENT(S) SERVED:	Check, Subpoena, Proof(s), Attachment(s)
COURT/AGENCY:	Central District of California - U.S. District Court, CA Case # 818CV02001JVSJDE
NATURE OF ACTION:	Subpoena - Business records - Pertaining to Marcelo Lamego
ON WHOM PROCESS WAS SERVED:	C T Corporation System, Los Angeles, CA
DATE AND HOUR OF SERVICE:	By Process Server on 01/08/2020 at 11:27
JURISDICTION SERVED :	California
APPEARANCE OR ANSWER DUE:	02/10/2020 at 10:00 a.m. (Document(s) may contain additional answer dates)
ATTORNEY(S) / SENDER(S):	Brian C. Claassen Knobbe, Martens, Olson & Bear LLP 2040 Main St., 14th Floor Irvine, CA 92614 949-760-0404
ACTION ITEMS:	SOP Papers with Transmittal, via UPS Next Day Air Image SOP Email Notification, Ami Gomez ami_r_gomez@apple.com Email Notification, Noreen Krall nkrall@apple.com Email Notification, David Melaugh melaugh@apple.com Email Notification, Colleen Brown colleen_brown@apple.com Email Notification, DIANA LOOP loop@apple.com Email Notification, Heather Moser hmoser@apple.com Email Notification, Tim O'Neil toneil@apple.com Email Notification, Charstie Wheelock wheelock@apple.com



**Service of Process
Transmittal**

01/08/2020

CT Log Number 536938677

TO: Ami Gomez
Apple Inc.
1 Infinite Loop, M/S 169-2NYJ
Cupertino, CA 95014-2083

RE: Process Served in California

FOR: Apple Inc. (Domestic State: CA)

Email Notification, Erik Floyd efloyd@apple.com

Email Notification, Beth Kellermann kellermann@apple.com

Email Notification, Ryan Moran rmoran@apple.com

Email Notification, Jennifer Brown jennifer_brown@apple.com

Email Notification, Susan Guarino sguarino@apple.com

Email Notification, Andrew Farthing afarthing@apple.com

Email Notification, Scott Murray scott_murray@apple.com

Email Notification, Pami Vyas pvyas@apple.com

Email Notification, Kim Moore kim_moore@apple.com

Email Notification, Lisa Olle olle@apple.com

Email Notification, Victoria Nakaahiki victoria_nakaahiki@apple.com

Email Notification, Maya Kumar maya_kumar@apple.com

Email Notification, Phil Rawlinson prawlinson@apple.com

Email Notification, Jessica Hannah jessica_hannah@apple.com

Email Notification, Kate Kaso-Howard kkasohoward@apple.com

Email Notification, Marc Breverman mbreverman@apple.com

Email Notification, STEPHANIE FINE stephanie_fine@apple.com

Email Notification, AMY HANDLER ahandler@apple.com

Email Notification, GABE ZELDIN gzeldin@apple.com

Email Notification, BENJAMIN HUH bhuh@apple.com

Email Notification, AARON HUANG aaron_y_huang@apple.com

Email Notification, JAMES WILEY, JR. jwileyjr@apple.com

Email Notification, JESSE KOEHLER jesse_koehler@apple.com



**Service of Process
Transmittal**

01/08/2020

CT Log Number 536938677

TO: Ami Gomez
Apple Inc.
1 Infinite Loop, M/S 169-2NYJ
Cupertino, CA 95014-2083

RE: **Process Served in California**

FOR: Apple Inc. (Domestic State: CA)

Email Notification, Andrew Stein andrew_stein@apple.com

Email Notification, Matt Clements matthew_clements@apple.com

Email Notification, NATALIE POUS npous@apple.com

Email Notification, ELVIS HOWARD elvis_howard@apple.com

Email Notification, TIFFANIE ROSE tiffanie_rose@apple.com

Email Notification, Sally Zenith zenith@apple.com

Email Notification, HENRY CORNILIE hcornillie@apple.com

Email Notification, MARA LUDMER mludmer@apple.com

SIGNED:
ADDRESS:

C T Corporation System
1999 Bryan St Ste 900
Dallas, TX 75201-3140

For Questions:

877-564-7529
MajorAccountTeam2@wolterskluwer.com

Page 3 of 3 / DP

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

MADDEN CORPORATION DBA PROLEGAL 733 W TAFT AVE ORANGE, CA 92665-4229		2996 16-24/1220 4515	
DATE <u>1/8/20</u>			
PAY TO THE ORDER OF <u>Apple Inc.</u>		\$ <u>91.62</u>	
<u>Ninety one and Sixty two</u>		DOLLARS	
FOR <u>Knobbe, (225627)(Claudia)</u>		<u>Proleg Legal</u>	
WELLS FARGO California wellsfargo.com		WELLS FARGO BANK, N.A. California wellsfargo.com	
⑆00000002996⑆ ⑆122000247⑆ 9234407915⑆			

1/8/20
9:20 Am

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the
Central District of California

Masimo Corporation and Cercacor Laboratories, Inc.

Plaintiffs

v.

True Wearables, Inc. and Marcelo Lamego

Defendants

Civil Action No. 8:18-cv-02001-JVS-JDE

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To:

Apple Inc.
One Apple Park Way, Cupertino CA 95014

(Name of person to whom this subpoena is directed)

☒ **Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:
Please see Exhibit A Attached for Topics.

Place: Knobbe, Martens, Olson & Bear LLP 333 Bush Street, Suite 2100 San Francisco, CA 94104	Date and Time: 02/10/2020 10:00 am
--	---------------------------------------

The deposition will be recorded by this method: stenographic, audio, video and/or real-time computer means

☒ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material: Please see Exhibit B attached. You are instructed to produce the documents by January 28, 2020 to the attention of Nicholas Belair at KNOBBE, MARTENS, OLSON & BEAR LLP, 333 Bush Street, Suite 2100, San Francisco, CA 94104.

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 01/07/2020

CLERK OF COURT

OR

/s/ Brian C. Claassen

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiffs
Masimo Corporation and Cercacor Laboratories, Inc., who issues or requests this subpoena, are:
Brian C. Claassen, Knobbe, Martens, Olson & Bear LLP, 2040 Main St., 14th Floor, Irvine CA 92614 (949) 760-0404

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. 8:18-cv-02001-JVS-JDE

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

☐ I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

EXHIBIT A

EXHIBIT A

A. The term "Masimo" shall mean Masimo Corporation and shall include any predecessor in interest, successor, subsidiary, affiliate, and/or division.

B. The term "Cercacor" shall mean Cercacor Laboratories, Inc. and shall include any predecessor in interest, successor, subsidiary, affiliate, and/or division.

C. The term "Plaintiffs" shall mean Masimo and Cercacor, collectively and/or individually.

D. The term "Lamego," shall mean and include the following individual, Marcelo Lamego, and any present or former principal, officer, director, employee, former employee, servant, agent, attorney, or other representative acting on behalf of Defendant Marcelo Lamego.

E. The term "True Wearables" shall mean True Wearables, Inc. and any present or former principal, officer, director, employee, former employee, servant, agent, attorney, or other representative acting on its behalf, and shall include any parent, subsidiary, division, predecessor, successor, or affiliate.

F. The terms "Defendants," "You," and "Your" shall mean Lamego and True Wearables, collectively and/or individually.

G. The terms "Oxxiom" or "Accused Product" shall mean True Wearables, Inc.'s hardware and/or iOS software application pulse oximeter product that, among other things, tracks oxygen saturation (SpO₂), pulse rate (PR) and perfusion index (PI).

H. The term "Masimo Asserted Patents" shall mean, individually and collectively: U.S. Patent Nos. 7,186,966 ("the '966 patent"), 7,295,866 ("the '866 patent"), 8,886,271 ("the '271 patent"), 8,983,564 ("the '564 patent"), 10,194,847 ("the '847 patent"), and 10,194,848 ("the '848 patent"), and any other patents that Masimo asserts in this litigation.

DEPOSITION TOPICS

TOPIC NO. 1:

Marcelo Lamego's involvement in, and technical disclosures to Apple regarding, physiological parameter monitoring, such as pulse oximetry and pulse rate monitoring.

TOPIC NO. 2:

Marcelo Lamego's contributions to Apple's marketing strategies for physiological parameter monitoring, such as pulse oximetry and pulse rate monitoring.

TOPIC NO. 3:

Marcelo Lamego's disclosures to Apple relating to light piping reduction in physiological parameter monitoring, such as pulse oximetry and pulse rate monitoring.

TOPIC NO. 4:

Marcelo Lamego's disclosures to Apple relating to the weighting and relative importance of separate calculation techniques for non-invasive measurement of blood parameters

TOPIC NO. 5:

Marcelo Lamego's disclosures to Apple relating to physiological parameter buffers during measurements in physiological parameter monitoring, such as pulse oximetry and pulse rate monitoring.

TOPIC NO. 6:

Marcelo Lamego's involvement in and disclosures to Apple regarding technical aspects of light emission and detection.

TOPIC NO. 7:

Apple's communications with Marcelo Lamego concerning Mr. Lamego's employment with Apple and termination thereof.

EXHIBIT B

EXHIBIT B

Pursuant to Rules 34 and 45 of the Federal Rules of Civil Procedure, and in

accordance with the following definitions and instructions, Plaintiffs request that Apple Inc. produce the documents and things identified in the requests for production below.

DEFINITIONS

1. The term “documents” is used in the broadest sense possible under Rule 34 of the Federal Rules of Civil Procedure, and includes all written or graphic matter, however produced or reproduced, including, but not limited to, originals (or copies where originals are unavailable) of correspondence, electronic mail, computer storage media (including, but not limited to, all active, inactive, and archived data files stored on hard drives, operating systems, software, floppy disks, magnetic tapes, zip drives, CD-ROMS, mainframe computers, desktop computers, home computers, laptops, mobile handheld devices, retired computer systems or any other storage medium), computer software needed to produce in human-readable form data from said computer storage media, instructions for using said computer software, telegrams, notes or sound recordings of any type of personal or telephone conversations, or of meetings or conferences, minutes of directors or committee meetings, memoranda, inter-office communications, studies, analyses, reports, engineering drawings, results of investigations, catalogs, contracts, licenses, agreements, working papers, statistical records, ledgers, books of account, vouchers, invoices, charge slips, freight bills, time sheets or logs, stenographers’ notebooks, diaries, or papers similar to any of the foregoing, however denominated.

2. The terms “communication” or “communications” mean any communication regardless of the manner in which the communication(s) took place, including, but not limited to, face-to-face conversations, correspondence,

1 electronic or computer mail, telephone calls, facsimile communications, or
2 telegrams.

3 3. The terms “describe,” “described” or “description” when used with
4 respect to any act, action, accounting, activity, audit, practice, process, occurrence,
5 course of conduct, happening, negotiation, relationship, scheme, communication,
6 conference, discussion, development, service, transaction, instance, incident or
7 event, means provide any or all of the following information (to the extent it is
8 available to you): its general nature; the time and place thereof; a chronological
9 account setting forth each element thereof, what such element consisted of, and
10 what transpired as a part thereof; the identity of each person who performed any
11 function or had any role in connection therewith (e.g., speaker, participant,
12 contributor of information, witness) or who has any knowledge thereof together
13 with a description of each person’s function, role, or knowledge; the identity of
14 each document which refers thereto or which was used, referred to, or prepared in
15 the course or as a result thereof; and identification of each communication which
16 was a part thereof or referred thereto. When used in connection with any
17 evaluation, calculation, or computation, the terms “describe,” “described” or
18 “description” mean provide any or all the following information: an explanation of
19 its meaning; an explanation of the manner in which it was derived; the identity of
20 each person who performed any function with respect thereto and a description of
21 his or her function; the identity of each document which refers thereto or which
22 was used, referred to, or prepared in the course of or as a result thereof; and the
23 identity of each communication which occurred in the course of the preparation
24 thereof or which referred thereto.

25 4. The term “you,” “your,” and “Apple” means Apple Inc., and its
26 associated entities (including subsidiaries and affiliates), companies acquired by
27 Apple Inc. or, employees, agents, partners, attorneys, and representatives.
28

1 5. The terms "person," "individual," and "entity" shall include natural
2 persons, corporations, and other legal or business entities, whether or not in your
3 employ, and the acts and knowledge of a person, individual or entity are defined to
4 include the acts and knowledge of that person's, individual's, or entity's directors,
5 officers, members, employees, representatives, agents, and attorneys.

6 6. The singular form of any noun or pronoun used herein includes
7 within its meaning the plural form thereof and vice versa; the neuter, masculine or
8 feminine form of any pronoun used herein includes within its meaning the neuter,
9 masculine and feminine forms; and the use herein of any tense of any verb
10 includes within its meaning all other tenses of the verb. In every such instance,
11 the specific request shall be construed in the broadest sense so as to call for the
12 most complete and inclusive answer.

13 7. The terms "and" and "or" shall be construed both conjunctively and
14 disjunctively, and the plural shall be construed as the singular, and vice versa, as
15 necessary and in order to bring within the scope of these requests for production
16 all documents that might otherwise be construed to be outside their scope.

17 INSTRUCTIONS

18 1. You are to produce every document and thing requested that is in
19 your possession, custody, or control, or within the possession, custody, or control
20 of any employees, agents, consultants, attorneys, and/or any other persons acting
21 or purporting to act on your behalf.

22 2. If you have any good faith objection to any request or any part
23 thereof, the specific nature of the objection and whether it applies to the entire
24 request or to a part of the request shall be stated. If there is an objection to any
25 part of a request, then the part objected to should be identified and documents
26 responsive to the remaining unobjectionable part should be produced.

27 3. Each request shall be answered separately.

28 4. Each request shall be answered on the basis of your entire

1 knowledge, from all sources.

2 5. For each document and thing requested herein that you withhold or
3 redact under a claim of attorney-client privilege, work product immunity, or any
4 other privilege or immunity, you shall provide an explanation of the basis for the
5 claim, including:

- 6 a. the date of the document;
- 7 b. the type of document (e.g., letter, memorandum, etc.);
- 8 c. the name and title of any and all authors or senders and any and all
9 addressees and copy recipients of the document and any and all
10 persons to whom the document was shown or to whom its subject
11 matter was disclosed;
- 12 d. the name of each person or persons (other than stenographic or
13 clerical assistants) participating in the preparation of the document or
14 in whose name the document was prepared;
- 15 e. the subject matter of the document;
- 16 f. the REQUEST FOR PRODUCTION to which the document is
17 responsive; and
- 18 g. a statement of the basis upon which the document has been redacted
19 or withheld, including the specific nature of the privilege or
20 exemption claimed and the detailed grounds for claiming such

21 6. For any document requested herein that has been destroyed or
22 misplaced, you shall provide the information described in paragraphs 5(a)-(e)
23 above, as well as a brief explanation of the circumstances (when, how, by whom,
24 and why) surrounding the document's destruction or loss, and any and all records
25 pertaining to its destruction or loss.

26 7. If you or your attorneys know of the existence, past or present, of any
27 document described in a request, but such document is not presently in your
28 possession, custody, or control or in the possession, custody, or control of its

1 agents, representatives, or attorneys, you shall so state in response to the request,
2 identify such document in response to the request, and identify the individual in
3 whose possession, custody, or control the document was last known to reside.

4 8. Documents shall be produced as they are maintained in the normal
5 course of business, including:

- 6 a. all associated file labels, file headings, and file folders shall be
7 produced together with the responsive documents from each file, and
8 each file shall be identified as to its owner or custodian;
9 b. all documents that cannot be legibly copied shall be produced in their
10 original form; otherwise, you may produce photocopies; and
11 c. each page shall be given a discrete production number.

12
13 **REQUESTS FOR PRODUCTION**

14 **REQUEST FOR PRODUCTION NO. 1:**

15 Documents sufficient to show Marcelo Lamego's involvement in any Apple
16 program or project relating to physiological parameter monitoring, including but
17 not limited to pulse oximetry and pulse rate monitoring.

18 **REQUEST FOR PRODUCTION NO. 2:**

19 All documents constituting, referring, or relating to Marcelo Lamego's
20 technical disclosures to Apple relating to physiological parameter monitoring,
21 including but not limited to pulse oximetry and pulse rate monitoring.

22 **REQUEST FOR PRODUCTION NO. 3:**

23 All documents generated in whole or in part by Marcelo Lamego while
24 employed at Apple and relating to physiological parameter monitoring, including
25 but not limited to pulse oximetry and pulse rate monitoring.

26 **REQUEST FOR PRODUCTION NO. 4:**

27 Documents sufficient to show Marcelo Lamego's contributions to Apple's
28 marketing strategies relating to physiological parameter monitoring, including but

1 not limited to pulse oximetry and pulse rate monitoring.

2 **REQUEST FOR PRODUCTION NO. 5:**

3 All documents constituting, referring, or relating to Marcelo Lamego's
4 disclosures to Apple regarding light piping reduction in physiological parameter
5 monitoring, including but not limited to pulse oximetry and pulse rate monitoring.

6 **REQUEST FOR PRODUCTION NO. 6:**

7 All documents constituting, referring, or relating to Marcelo Lamego's
8 disclosures to Apple regarding the weighting and relative importance of separate
9 calculation techniques for non-invasive measurement of blood parameters.

10 **REQUEST FOR PRODUCTION NO. 7:**

11 All documents constituting, referring, or relating to Marcelo Lamego's
12 disclosures to Apple regarding physiological parameter buffers during
13 measurements of physiological parameters in physiological parameter monitoring,
14 including but not limited to pulse oximetry and pulse rate monitoring.

15 **REQUEST FOR PRODUCTION NO. 8:**

16 Documents sufficient to show Marcelo Lamego's involvement in any Apple
17 program or project relating to the technical aspects of light emission and detection

18 **REQUEST FOR PRODUCTION NO. 9:**

19 All documents constituting, referring, or relating to Marcelo Lamego's
20 disclosures to Apple regarding the technical aspects of light emission and
21 detection.

22 **REQUEST FOR PRODUCTION NO. 10:**

23 All communications with Marcelo Lamego regarding his employment at
24 Apple, including his recruitment and termination.

25

26 ///

27 ///

28 ///

1 **REQUEST FOR PRODUCTION NO. 11:**

2 All agreements between Marcelo Lamago and Apple concerning his
3 employment by Apple, including but not limited to employment agreements,
4 assignment agreements, confidentiality agreements, separation or termination
5 agreements.

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Exhibit 2

From: [Lerner, Joshua H.](#)
To: [Irfan.Lateef](#); [Hannah Cannom](#)
Cc: [Samplin, Ilissa](#)
Subject: RE: Masimo v. TrueWearables - Apple TPS
Date: Thursday, March 5, 2020 8:16:10 AM

Hi Irfan, Following up on this so we can work with your schedule. Thanks, Josh

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Lerner, Joshua H.
Sent: Wednesday, March 4, 2020 9:07 PM
To: 'Irfan.Lateef' <irfan.lateef@knobbe.com>; 'Hannah Cannom' <hcannom@wscllp.com>
Cc: Samplin, Ilissa <ISamplin@gibsondunn.com>
Subject: RE: Masimo v. TrueWearables - Apple TPS

Irfan, We are happy to work with your schedule assuming we agree to move the deadline for us to object or otherwise respond until Tuesday (so that, as originally scheduled, we can have a few days to follow up with our client if necessary). Thanks.

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Irfan.Lateef <irfan.lateef@knobbe.com>
Sent: Wednesday, March 4, 2020 8:51 PM
To: Lerner, Joshua H. <JLerner@gibsondunn.com>; Hannah Cannom <hcannom@wscllp.com>
Cc: Morrisson, Haley S. <HMorrisson@gibsondunn.com>
Subject: RE: Masimo v. TrueWearables - Apple TPS

[External Email]
Hi Josh,

Sorry for the delayed response. I can talk tomorrow late afternoon if that works?

Irfan

From: Lerner, Joshua H. <JLerner@gibsondunn.com>
Sent: Wednesday, March 4, 2020 16:47
To: Irfan.Lateef <irfan.lateef@knobbe.com>; Hannah Cannom <hcannom@wscllp.com>
Cc: Morrisson, Haley S. <HMorrisson@gibsondunn.com>
Subject: RE: Masimo v. TrueWearables - Apple TPS

Hi Irfan, I'm assuming you're busy, but I would like to nail this down. If you need to, should we move this a week (talk next Wednesday and object or respond by next Friday)? Please let us know. Best, Josh

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Lerner, Joshua H.
Sent: Wednesday, March 4, 2020 12:10 PM
To: 'Irfan.Lateef' <irfan.lateef@knobbe.com>; 'Hannah Cannom' <hcannom@wscllp.com>
Cc: Morrisson, Haley S. <HMorrisson@gibsondunn.com>
Subject: RE: Masimo v. TrueWearables - Apple TPS

Hi Irfan, Just following up on this. Thanks, Josh

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Lerner, Joshua H.
Sent: Wednesday, March 4, 2020 9:25 AM
To: 'Irfan.Lateef' <irfan.lateef@knobbe.com>; Hannah Cannom <hcannom@wscllp.com>
Cc: Morrisson, Haley S. <HMorrisson@gibsondunn.com>

Subject: RE: Masimo v. TrueWearables - Apple TPS

Irfan,

We just received a notification that you declined the calendar invite for the meet and confer. Are you available at another time today?

Thanks, Josh

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Irfan.Lateef <irfan.lateef@knobbe.com>

Sent: Thursday, February 27, 2020 6:16 PM

To: Lerner, Joshua H. <JLerner@gibsondunn.com>; Hannah Cannom <hcannom@wscllp.com>

Cc: Morrisson, Haley S. <HMorrisson@gibsondunn.com>

Subject: RE: Masimo v. TrueWearables - Apple TPS

[External Email]

Sorry for the delay. Yes, this works.

Thanks,
Irfan

From: Lerner, Joshua H. <JLerner@gibsondunn.com>

Sent: Thursday, February 27, 2020 17:22

To: Irfan.Lateef <irfan.lateef@knobbe.com>; Hannah Cannom <hcannom@wscllp.com>

Cc: Morrisson, Haley S. <HMorrisson@gibsondunn.com>

Subject: RE: Masimo v. TrueWearables - Apple TPS

Irfan, Sorry for pestering, but does this work for you? I need to lock down. Thanks.

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Lerner, Joshua H.
Sent: Thursday, February 27, 2020 1:28 PM
To: 'Irfan.Lateef' <irfan.lateef@knobbe.com>; 'Hannah Cannom' <hcannom@wscllp.com>
Cc: Morrisson, Haley S. <HMorrisson@gibsondunn.com>
Subject: RE: Masimo v. TrueWearables - Apple TPS

And sorry but before my schedule changes, does 10:30 a.m. PST on Wed work for you?
Thanks.

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Lerner, Joshua H.
Sent: Thursday, February 27, 2020 1:16 PM
To: 'Irfan.Lateef' <irfan.lateef@knobbe.com>; Hannah Cannom <hcannom@wscllp.com>
Cc: Morrisson, Haley S. <HMorrisson@gibsondunn.com>
Subject: RE: Masimo v. TrueWearables - Apple TPS

Irfan:

Thanks for the productive call yesterday. I'm confirming that we will put off the deadline for Apple to object or otherwise respond until March 6 and to confer again on March 4. Please let us know if any other questions or comments; otherwise let us know when is good for you next Wednesday.

Thanks, Josh

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Irfan.Lateef <irfan.lateef@knobbe.com>

Sent: Tuesday, February 25, 2020 3:13 PM

To: Hannah Cannom <hcannom@wscllp.com>; Lerner, Joshua H. <JLerner@gibsondunn.com>

Cc: Morrisson, Haley S. <HMorrisson@gibsondunn.com>

Subject: RE: Masimo v. TrueWearables - Apple TPS

[External Email]

Hi,

Sorry for the delay on this. I am free tomorrow afternoon after 2:30pm. Let me know if that works.

Thanks,

Irfan

From: Hannah Cannom <hcannom@wscllp.com>

Sent: Tuesday, February 25, 2020 15:07

To: Lerner, Joshua H. <JLerner@gibsondunn.com>; Irfan.Lateef <irfan.lateef@knobbe.com>

Cc: Morrisson, Haley S. <HMorrisson@gibsondunn.com>

Subject: Re: Masimo v. TrueWearables - Apple TPS

I'm free tomorrow after 10:30am PT.

Hannah Cannom

Walker Stevens Cannom LLP

(213) 337-9972 | hcannom@wscllp.com

From: "Lerner, Joshua H." <JLerner@gibsondunn.com>

Date: Tuesday, February 25, 2020 at 2:01 PM

To: "Irfan.Lateef" <irfan.lateef@knobbe.com>

Cc: Hannah Cannom <hcannom@wscllp.com>, "Morrisson, Haley S." <HMorrisson@gibsondunn.com>

Subject: RE: Masimo v. TrueWearables - Apple TPS

Hi Irfan, My afternoon is now filling up so I'm following up on this – if you cannot speak later today, does tomorrow morning work for everyone? Thanks, Josh

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Lerner, Joshua H.
Sent: Monday, February 24, 2020 5:32 PM
To: 'Irfan.Lateef' <irfan.lateef@knobbe.com>
Cc: 'Hannah Cannom' <hcannom@wscllp.com>
Subject: RE: Masimo v. TrueWearables - Apple TPS

Hi Irfan, Just following up on this. Thank you.

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Lerner, Joshua H.
Sent: Friday, February 21, 2020 10:54 AM
To: 'Irfan.Lateef' <irfan.lateef@knobbe.com>
Cc: 'Hannah Cannom' <hcannom@wscllp.com>
Subject: RE: Masimo v. TrueWearables - Apple TPS

Hi Irfan, Does after 3:30 PST work for you? Best, Josh

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Irfan.Lateef <irfan.lateef@knobbe.com>
Sent: Wednesday, February 19, 2020 6:22 PM
To: Lerner, Joshua H. <JLerner@gibsondunn.com>
Cc: Hannah Cannom <hcannom@wscllp.com>
Subject: RE: Masimo v. TrueWearables - Apple TPS

[External Email]

Hi Josh,

Nice to meet you as well. An extension is no problem. Let's extend the deadline to February 28. Would the afternoon of February 25 (Tuesday) work for both of you for a call?

Thanks,
Irfan

From: Lerner, Joshua H. <JLerner@gibsondunn.com>

Sent: Wednesday, February 19, 2020 18:14

To: Irfan.Lateef <irfan.lateef@knobbe.com>

Cc: Hannah Cannom <hcannom@wscllp.com>

Subject: FW: Masimo v. TrueWearables - Apple TPS

Hi Irfan,

Nice to meet you by email. As you may have heard, we are representing Apple in the recently filed case by Masimo and therefore are working with Hannah on this. We wanted to reach out to seek an extension of the deadline below for an additional week during which all of us can get on a call. If that works, I'm available this week and next – just let us know what works best for you.

Best, Josh

Joshua H. Lerner

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JLerner@gibsondunn.com • www.gibsondunn.com

From: Hannah Cannom <>

Date: Thursday, February 6, 2020 at 2:03 PM

To: bstevens <bstevens@wscllp.com>, "" <irfan.lateef@knobbe.com>

Subject: Re: Masimo v. TrueWearables - Apple TPS

Irfan,

Thanks for the quick call this afternoon. As discussed, we agreed to further extend the deadline for Apple to object or otherwise respond to the subpoena to February 20, 2020.

We'll reach out next week for a further update, but please let me know if you would like to discuss in the interim.

Best,
Hannah

Hannah Cannom
Walker Stevens Cannom LLP
(213) 337-9972 | hcannom@wscllp.com

From: bstevens <bstevens@wscllp.com>
Date: Friday, January 24, 2020 at 3:09 PM
To: "Irfan.Lateef@knobbe.com" <irfan.lateef@knobbe.com>
Cc: Hannah Cannom <hcannom@wscllp.com>
Subject: Re: Masimo v. TrueWearables - Apple TPS

Irfan,
Thanks for the follow-up call this afternoon. As discussed, I'm writing to confirm our agreement to further extend the time for Apple to object or otherwise respond to the subpoena to February 10, 2020.
We will touch base for a further update either late next week or early the following.
Best,
Bethany

Bethany Stevens
Walker Stevens Cannom LLP
(213) 337-4551 | bstevens@wscllp.com

From: Hannah Cannom <hcannom@wscllp.com>
Date: Tuesday, January 14, 2020 at 5:03 PM
To: "Irfan.Lateef@knobbe.com" <irfan.lateef@knobbe.com>
Cc: Bethany Stevens <bstevens@wscllp.com>, Hannah Cannom <hcannom@wscllp.com>
Subject: Masimo v. TrueWearables - Apple TPS

Irfan,
Thanks for taking the time to speak with us today. As discussed, Apple's deadline to object or otherwise respond to the subpoena is extended up to and including January 30, 2020. Please be in touch in the interim as your case schedule takes shape.

Best,

Hannah

Hannah Cannom
Walker Stevens Cannom LLP
(213) 337-9972 | hcannom@wscllp.com

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Exhibit 3

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Joshua H. Lerner
Direct: +1 415.393.8254
Fax: +1 415.374.8499
JLerner@gibsondunn.com

March 9, 2020

VIA EMAIL (IRFAN.LATEEF@KNOBBE.COM)

Irfan Lateef
Knobbe, Martens, Olson & Bear LLP
2040 Main Street, Fourteenth Floor
Irvine, CA 92614

Re: Masimo Corp. et al. v. True Wearables Inc. et al., No. 8:18-cv-02001-JVS-JDE

Dear Irfan:

I write to follow up on our meet and confer on Thursday March 5, 2020 regarding the reasons why the non-party subpoena served on Apple Inc. ("Apple") in this matter is improper and should be withdrawn entirely. We did not hear back from you on Friday March 6, 2020, as the parties discussed, regarding your final position. If the subpoena is not withdrawn, Apple is prepared to move to quash and for a protective order for the reasons set forth below.

First, Plaintiffs served the subpoena the *day before* it filed an action against Apple for patent infringement and trade secret misappropriation. *See Masimo Corp. et al. v. Apple, Inc.*, No. 8:20-cv-00048-JVS (JDEx) (C.D. Cal. filed Jan. 9, 2020) (the "Apple Case"). Whereas this case (the "True Wearables Case") is focused on Mr. Lamego and his company—and does not require discovery from Apple—the subpoena on its face goes to the claims that Plaintiffs are now pursuing against Apple in the Apple Case. Indeed, during our telephonic meet and confer on March 5, 2020, you seemed to acknowledge that the trade secret misappropriation alleged in the First Amended Complaint in this case pertains to True Wearables, and not to Apple. Therefore, Plaintiffs' subpoena appears to be a transparent attempt to obtain discovery before the Court has even issued a scheduling order in the Apple Case. As you know, the Initial Standing Order entered in the Apple Case by then-presiding Judge Carter states that "[p]ursuant to Rule 16(b), the Court will set a scheduling conference and issue a scheduling order in each case," and Judge Carter had not yet done so. Additionally, the Court transferred the Apple Case to Judge Selna on March 4, 2020, and Judge Selna has not entered an Initial Order, much less set a scheduling conference or issued a scheduling order. It is improper for Plaintiffs to have sought to bypass the current Initial Order and Federal Rule of Civil Procedure 26(d)'s mandate that no discovery be served prior to the Rule 26(f) conference by pursuing discovery against Apple over two months before such discovery may

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Irfan Lateef
March 9, 2020
Page 2

be authorized or commenced, when such discovery is so obviously intended to be used for purposes of the Apple Case.

Second, Plaintiffs have not defined their trade secrets in the Apple Case with sufficient particularity. Under California Code of Civil Procedure Section 2019.210 (“Section 2019”), a “party alleging the misappropriation” may not even “commenc[e] discovery relating to the trade secret” in “any action alleging the misappropriation” without first “identify[ing] the trade secret with reasonable particularity.” Cal. Code Civ. Proc. § 2019.210; *see M/A-COM Tech. Sols., Inc. v. Litrinium, Inc.*, 2019 WL 4284523, at *2 (C.D. Cal. June 11, 2019) (“[U]nder the particular facts of this case, the procedural requirements of Section 2019.210 are warranted and appropriate to assist in the orderly and expeditious handling of discovery.”); *Soc. Apps, LLC v. Zynga, Inc.*, 2012 WL 2203063, at *2 (N.D. Cal. June 14, 2012) (applying Section 2019.210 because it “assists the court and parties in defining the appropriate scope of discovery”).

Third, it would be inappropriate to proceed with the subpoena because no protective order is in place. The topics noticed for deposition and the requests for production in the subpoena implicate Apple’s highly sensitive, confidential information. Apple will not disclose such information without a protective order in place.

If we do not hear back from you before 2:00 p.m. PST on the agreed-upon deadline for us to object or otherwise respond (Tuesday, March 10), we will move to quash and for a protective order.

Sincerely,



Joshua H. Lerner